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CASE NO. 86-2060

IN THE
SUPREME COURT OF THE UNITED STATES

October Term 1987

WILLIAM REY,

Petitioner,

versus

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

REPLY BRIEF OF PETITIONER

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QUESTION PRESENTED FOR REVIEW

WHETHER THE ALLEN INSTRUCTION SANCTIONED BY THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT AND GIVEN TO THE JURY IN THE CASE AT BAR OVER DEFENSE OBJECTION UNDULY COERCED THE JURY INTO RENDERING ITS VERDICT AGAINST THE PETITIONER IN THIS CASE WHERE THE ALLEN INSTRUCTION IMMEDIATELY CAUSED THE RESIGNATION OF THE JURY FOREWOMAN, SUBSTITUTION OF ANOTHER FOREPERSON, AND A PROMPT VERDICT OF GUILT AGAINST THE PETITIONER, AND WHETHER THE ALLEN INSTRUCTION AS PRESENTLY UTILIZED IN THE FEDERAL COURTS UNDERMINES CONFIDENCE IN THE JURY'S FACT FINDING FUNCTION, IN VIOLATION OF THE PETITIONER'S RIGHT TO A FAIR AND IMPARTIAL JURY AND TO DUE PROCESS OF LAW PURSUANT TO THE SIXTH AND FIFTH AMENDMENTS TO THE UNITED STATES CONSTITUTION?

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1. The government's reliance on lower court decisions is flawed precisely because in each of the decisions cited, the court was forced to begin its analysis from the position that the Allen instruction was constitutional. It is that very assumption which we seek to have reconsidered. If a single juror was caused to change his or her verdict for any reason other than a belief in the defendant's guilt and if that change was caused by the Allen instruction given in this case, that instruction was coercive, period.

2. The government seeks to trivialize the instruction at bar by characterizing it as merely a species of "duty to deliberate" instructions.

The government argues that unless this Court chooses to promulgate pattern instructions, variations such as the one at bar will occur. This argument assumes that we are contesting the validity of "duty to deliberate" instructions in general. In fact, had the court below given the instruction that was given in United States v. Nichols, 820 F.2d 508, 511-512 (1st Cir. 1987), cited by the government, we would not be before this Court now.

In the instant case, the jury was told that the trial had been expensive in time, effort, and money to both sides, that in the event of a hung jury the case might have to be tried again, and that retrial would be costly to both sides. (A.32). The jurors were also labeled as being either in the

majority or the minority and, despite the government's parsing of the district court's words, most likely understood that it was the minority that was expected to reconsider its views.

In Nichols, by contrast, there was no mention of the need for a retrial or the expense to either side; nor were jurors in the majority singled out. The court merely asked those "favoring acquittal" and those "for conviction" to reconsider their positions. This was further emphasized when the court told the jurors that they should reconsider their view regardless of whether they were in the majority or the minority. Finally, the jurors were told that they had a right not to

agree.[1, 2] 820 F.2d at 511.

As the discussion above makes clear, not all "duty to deliberate" instructions are equal. Some, as in Nichols properly focus a jury's attention on the importance of considering the views of fellow jurors. Others, like the one at bar, pressure the jury into arriving at a verdict based on considerations wholly irrelevant to the determination of the defendant's guilt or innocence. Fundamentally, the reason why the

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[1] The lack of coercion was also demonstrated by the jury's verdict in that case, finding some of the defendants guilty on some counts but acquitting on others. Id. at 510.

[2] So balanced was the Nichols instruction, that one of the defense attorneys "withdrew his objection after the charge was given. . .". 820 F.2d at 512 n.3.

government's argument is so unvailing is that the instruction given herein did suffer from many of the infirmities noted in other cases and recognized by the government as being "unfairly" coercive.

3. The government misreads the instruction given herein in an attempt to show that it did not suffer from the faults condemned by courts and commentators.

a. According to the government, the instruction did not place undue emphasis on the prospect of a retrial since it only told the jury that the case "might" have to be retried again. The government further asserts that the instruction did not "dwell" on the expense of the instant prosecution or on the cost that a retrial would impose

on the parties.

A cursory reading of the actual instruction disposes of these contentions. See A.31-37. The second sentence of the second paragraph told the jury that:

> The trial has been expensive in time, effort, money and emotional strain to both the defense and the prosecution. (A.31-32).

The jury was then told in the third paragraph:

> Now if you should fail to agree upon a verdict, the case will be left open and may have to be tried again. (A.32).

In the first sentence of the fourth paragraph the jury was told:

> Obviously, another trial would only serve to increase the costs to both sides. (A.32).

Finally, in the second sentence of the

fourth paragraph and in the entirety of the fifth paragraph the jury was informed of the effort that would go into picking a new jury and they were assured that the effort would not produce a better jury or clearer evidence. (A.32).

Plainly, these four paragraphs told the jury that if they could not reach a verdict they were not doing their job and that those persons holding up the process were causing great incovenience and expense to others. Of course, none of this had anything to do with the guilt or innocence of the defendant.

b. The government also asserts that the instruction was balanced, telling both jurors in the majority and the minority that they should

reconsider their views. Again, this is an interpretation which is belied by the instruction itself. What the court actually said was, "if a substantial majority of your number are in favor of a conviction, those of you who disagree should reconsider whether your doubt is a reasonable one. . ." and "if a majority or even a lesser number of you are in favor of an acquittal, the rest of you should ask yourselves again and most thoughtfully whether you should accept the weight and sufficiency of the evidence which fails to convince your fellow jurors. . .". (A.33).[3]

The government would have this

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[3] Contrary to the assertion found in the government's response, the instruction did not say that "if only a minority of the jurors favored acquittal, the others should

Court believe that a juror hearing this instruction would go back to the jury room and reconsider his or her views regardless of whether he or she was in the majority, regardless of whether the majority was in favor of conviction, and regardelss of how large that majority was. This contention is nonsense. Any juror listening to this instruction would conclude that only if a majority of jurors favored acquittal would those favoring conviction need to

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[3] (continued) reconsider." (Response, p.7). Those favoring conviction were only asked to reconsider their views if "a majority or even a lesser number of you" were in favor of acquittal. Fundamentally, what should have been said was that if a substantial majority were in favor of conviction, they should nevertheless reconsider their views in light of the minority. Even the government does not contend that the instruction would lend itself to that interpretation.

reconsider their views and that if a majority, particularly a substantial majority, favored conviction, the majority would not need to reconsider their views in light of the one or two dissenters.

If, as was likely the situation in this case, only one or two jurors were holding out for acquittal, this instruction told the jury that it was these dissenters who should reconsider their views. As the Eleventh Circuit recognized, regardless of the specific wording of the charge, "[p]ractically, the pressure to change position will fall most heavily on the minority." (A.256). (Eleventh Circuit's emphasis). That was no less true in this case.

4. Contrary to the assertion

contained in the government's brief, the Eleventh Circuit did hold that the jury was coerced by the Allen charge given herein. The court did not merely say that if the issue were one of first impression it would hold that the Allen charge given in this case was impermissible. (A.29). Referring to that portion of the instruction dealing with the expense of the trial, the court stated:

> The practical effect of such an instruction is to discourage jurors in the minority and to pressure them to abandon their honestly held beliefs, not in response to considerations regarding the guilt or innocence of the defendant, but in response to the expediency of saving expenses. (A.23).

Referring to that portion of the instruction which told jurors in the minority to reconsider their views if

there was a substantial majority in favor of conviction, the court said, "Practically, the pressure to change position will fall most heavily on the minority." (A.25). (Eleventh Circuit's emphasis).

If the court did not believe that the jury had been coerced by the charge, there would have been absolutely no reason to make these statements. Plainly, the Eleventh Circuit upheld the conviction herein, not because of any real confidence in the reliability of the fact finding process, but because it was bound by Allen and Allen's progeny.

5. As the government has pointed out, the legitimacy of the Allen charge in the context of the penalty phase of a capital case is before this Court in

Lowenfield v. Phelps, No. 86-6867. While noting the various procedural distinctions between that case and the one at bar, the government nevertheless invites this Court to hold the instant case for disposition in light of Lowenfield. The instruction in Lowenfield, however, is a true "duty to deliberate" charge and is as mild if not milder than the instruction recomended by the American Bar Association. Thus, what the government would have this Court do is decide the legitimacy of the truly coercive instruction given here in light of this Court's disposition of an instruction which may not be coercive at all.

If this Court is to reconsider the legitimacy of the Allen charge it should do so in a case that presents a

true Allen instruction and in the kind of situation that happens every day in this country. Given the growing conflict among the state courts and the split in the federal circuits, this Court should accept review in this case so as to afford the petitioner here an opportunity to brief the distinctive issues raised herein. Lowenfield and the case at bar present the Court with an opportunity to determine the constitutional validity of such instructions in companion cases, the former in the penalty phase of a state capital case (albeit on federal habeas) and the latter in a non-capital federal case.

CONCLUSION

For these reasons, as well as those set forth in petitioner's initial petition, this Court should grant certiorari and reconsider the constitutionality of the Allen instruction.

Respectfully submitted,

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